



SPECIAL PUBLIC NOTICE

U.S. ARMY CORPS OF ENGINEERS
ALBUQUERQUE DISTRICT

BUILDING STRONG®

THE CLEAN WATER ACT SECTION 401 CERTIFICATION RULE

This special public notice is provided to inform stakeholders and prospective applicants for U.S. Army Corps of Engineers (Corps), Albuquerque District permits under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act (RHA) of new procedural requirements established by the U.S. Environmental Protection Agency's (EPA) newly promulgated regulation implementing Section 401 of the federal Clean Water Act.

Effective September 11, 2020, the CWA Section 401 Certification Rule (85 Federal Register 42,210) is being implemented nationwide and will be codified within the Code of Federal Regulations at Title 40, Part 121. Section 401 of the CWA provides states and authorized tribes with an important tool to help protect the water quality of federally regulated waters within their borders, in collaboration with federal agencies. Section 401 of the CWA requires that, for any federally licensed or permitted project that may result in a discharge into waters of the United States, a water quality certification (WQC) be issued to ensure that the discharge complies with applicable water quality standards. The CWA Section 401 Certification Rule (Rule) addresses the certification process, including timelines for review and action, the scope of certification review, and early engagement (i.e. pre-filing meetings). More information on the Rule is available at the following website: <https://www.epa.gov/CWA-401>. For information regarding certifying authorities within the Corps, Albuquerque District, please visit our website at <https://www.spa.usace.army.mil/Missions/Regulatory-Program-and-Permits/Water-Quality-Certification/>. All stakeholders and prospective permit applicants are encouraged to be familiar with the requirements of the new rule.

1. Important Considerations for Project Proponents:

a. Before submitting a request for an individual Section 401 WQC to the certifying authority (state/Tribe/EPA)¹, a project proponent **must** request a pre-filing meeting with the certifying authority **at least 30 days prior** to submitting the WQC request. The certifying authority will determine whether the meeting will be held, but submittal of the request for a pre-filing meeting is required².

¹ The certifying authority for all non-tribal lands in New Mexico is the New Mexico Environment Department, Surface Water Quality Bureau. For Tribes with certifying authority within New Mexico Colorado, and Texas see the list on our website at the address above. For Tribes without certifying authority in Colorado, EPA Region 8 is the certifying authority. For allotted lands within the Navajo Nation, EPA Region 9 is the certifying authority. For Tribes without certifying authority within New Mexico and Texas, EPA Region 6 is the certifying authority. The Texas Commission for Environmental Quality is the certifying authority on non-tribal lands in Texas.

² Projects qualifying for an existing general WQC are not required to go through the new Section 401 WQC process (it is important to note that existing general WQCs are specific to the certifying authority [i.e. state/Tribes/EPA]). However, the Corps is in the process of revising and reissuing all of the Nationwide Permits (NWP) and as part of that process Corps Districts will be requesting general WQC from certifying authorities. At present, it is not known the extent to which certifying authorities will grant general WQCs for the new NWPs.

b. After the pre-filing meeting request has been submitted and 30 calendar days have elapsed, applicants must submit their requests for WQC to the certifying authority and the Corps, Albuquerque District, Regulatory Division (RD) concurrently.

c. The Rule defines what a request for WQC entails. It specifies that a request must contain the following information:

- (1) The name of the project proponent(s) and a point of contact, including contact information;
- (2) Identification of the proposed project (i.e. overall project description);
- (3) The applicable federal license or permit;
- (4) The location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
- (5) A description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;
- (6) A list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;
- (7) Documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
- (8) A certification statement as follows: "The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief"; and
- (9) A statement as follows: "The project proponent hereby requests that the certifying authority review and take action on this CWA Section 401 certification request within the applicable reasonable period of time".

2. WQC Request Timeframes:

The Rule requires that action on a WQC request must be taken by the certifying authority within a reasonable period of time determined by the federal licensing or permitting agency, but in no case later than one year after receipt of a certification request. The RD will establish the reasonable period of time on either a categorical or case-by-case basis, according to criteria prescribed by the Rule. The criteria used to establish the reasonable period of time are: (1) the complexity of the proposed project; (2) the nature of any potential discharge; and (3) the potential need for additional study or evaluation of water quality effects from the discharge.

Within 15 days of receipt of a request for WQC, the RD will notify the certifying authority of the following information: (1) the date of receipt; (2) the applicable reasonable period of time to act on the certification request; and (3) the date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request. Once the certifying authority has received RD's notice of the reasonable period of time, the certifying authority or project proponent may make a written request for extension, if necessary. If RD agrees to extend the reasonable period of time, the certifying authority and project proponent shall be notified in writing. However, the reasonable period of time may not exceed one year.

3. Post-certification Process – Determination of effect on neighboring jurisdictions

In accordance with Section 121.12 of the Rule, the Corps shall notify the EPA within 5 days of receipt of a permit application and related certification. Within 30 days after receiving this notification, the EPA may determine that the discharge from the certified project may affect water quality in a

neighboring jurisdiction. If the EPA determines that the discharge from the certified project may affect water quality in a neighboring jurisdiction, the EPA will notify the neighboring jurisdiction, the certifying authority, the Corps, and the project proponent within that 30 days. This neighboring jurisdiction will have 60 days to notify the EPA and Corps whether it has determined that the discharge will violate any of its water quality requirements, to object to the issuance of the permit, and to request a public hearing.

Attached to this Public Notice is a flow chart outlining the general process and timing of the WQC issuance but is not all encompassing as certain scenarios may alter timeframes and include additional procedural requirements.

If you have any questions regarding this special public notice, please contact Daniel Delgado at (505) 342-3220 or by email at Daniel.i.Delgado@usace.army.mil.

DEPARTMENT OF THE ARMY
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